UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE ENRON CORPORATION SECURITIES, DERIVATIVE & ERISA LITIGATION	MDL 1446
MARK NEWBY, et al., Plaintiffs, v. ENRON CORPORATION, et al., Defendants.	Civil Action No. H-01-3624 and Consolidated Cases
SILVERCREEK MANAGEMENT INC., et al. Plaintiffs, v. SALOMON SMITH BARNEY, INC., et al., Defendants.	Civil Action No. H-02-3185

OPPOSED MOTION OF DEFENDANT GOLDMAN, SACHS & CO. FOR CLARIFICATION AND RECONSIDERATION OF THE COURT'S DECEMBER 10, 2003 MEMORANDUM AND ORDER

1. Defendant Goldman, Sachs & Co. ("Goldman Sachs") respectfully submits this motion requesting an order clarifying and reconsidering the Court's December 10, 2003 Memorandum and Order ("Memorandum and Order"). Clarification is requested because the Court apparently believed that a proposed amended complaint which plaintiffs had sought leave to file was already on file as the operative complaint In fact, the Court had not ruled plaintiffs' motion for leave to file the amended complaint, nor had the proposed amended complaint been filed as an active complaint. Reconsideration is requested because it appears

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from the Memorandum and Order that in denying defendants' motion to dismiss one of the claims in the complaint, the Court relied upon allegations in the inoperative proposed amended complaint as well as a declaration submitted by plaintiffs that had previously been stricken by the Court.

2. In support of this motion, Goldman Sachs states as follows:

Procedural Background

3. Plaintiffs Silvercreek Management, et al., filed this action ("Silvercreek I") in the United States District Court for the Southern District of New York on January 16, 2002. The action asserts claims under § 11 of the Securities Act of 1933 and common law claims for fraud and negligent misrepresentation. On March 20, 2002, Goldman Sachs (like its co-defendants Banc of America Securities LLC and Salomon Smith Barney, Inc.) moved to dismiss the complaint for failure to state a claim. On June 24, 2002, the MDL Panel transferred Silvercreek I to this Court for coordinated or consolidated pretrial proceedings.

4. In November, 2000, plaintiffs in this case filed a second, separate action in the United States District Court for the Southern District of New York, against fifty-five defendants, including Bank of America Corporation and Citigroup, Inc., the parent corporations of Banc of America Securities LLC and Salomon Smith Barney, respectively (Silvercreek II). On February 25, 2003, plaintiffs filed a first amended complaint in Silvercreek II. The first amended complaint in Silvercreek II asserts claims under §§ 11 and 15 of the 1933 Act, §§ 10(b) and 20(a) of the Securities Exchange Act of 1934, and the Texas Securities Act, as well as common law claims for fraud and negligent misrepresentation. On January 15, 2003, the MDL Panel transferred Silvercreek II to this Court.

5. Goldman Sachs is not a defendant in Silvercreek II.

6. On March 26, 2003, in connection with the pending motion to dismiss in Silvercreek I, the Court entered an order striking the Affidavit of Max Gitter submitted in support of the motion and the Declaration of Louise Morwick submitted in opposition to the motion (the "Morwick Declaration").

7. On March 27, 2003, plaintiffs filed a motion for leave to amend the complaint in Silvercreek I. The proposed amended complaint added allegations similar to those in the complaint in Silvercreek II, but it did not add new parties.

8. This Court has not ruled on plaintiffs' motion for leave to file the proposed amended complaint in Silvercreek I, and the proposed amended complaint has not been filed as an active amended complaint.

9. On April 17, 2003, Banc of America Securities, Salomon Smith Barney, and the plaintiffs entered into a stipulation which, among other things, (a) stated that those defendants did not oppose plaintiffs' motion for leave to amend the complaint in Silvercreek I; (b) contemplated that if this Court granted the motion to amend, then those defendants would then answer or move with respect to the amended complaint within 45 days thereafter; and (c) stated that the parties to the stipulation would seek an order consolidating Silvercreek I and Silvercreek II.

10. Goldman Sachs, which is not a party in Silvercreek II, was not a party to the stipulation of April 17, 2003. (Among other reasons: Goldman Sachs does not believe it would be appropriate to consolidate Silvercreek I and Silvercreek II, thereby making Goldman Sachs, for many practical purposes, a party to a 55-defendant case in which it is not in fact a party.)

11. On July 11, 2003, the Court entered a general scheduling order, which provides, inter alia, that filing of responsive pleadings is stayed until after the Court resolves the motions for class certification in Newby and Tittle.

12. On December 10, 2003, this Court issued its Memorandum and Order deciding the motion to dismiss Silvercreek I. With respect to Goldman Sachs, the Court, inter alia, dismissed the common law counts asserted by plaintiffs, but the Court denied the motion to dismiss with respect to plaintiffs' claim under § 11 of the 1933 Act.

Goldman Sachs' Request for Clarification

13. In its Memorandum and Order, the Court wrote that the "original complaint" in Silvercreek I "has been superseded by stipulation (#65) by Plaintiffs' first amended complaint (#61)." Goldman Sachs respectfully submits that this statement is not accurate. First, as noted above, Goldman Sachs is not a party to that stipulation. Second, as explained in the motion for clarification being filed by Banc of America Securities and Salomon Smith Barney, which are parties to the stipulation, the stipulation does not make the proposed amended complaint the operative complaint in this matter until the Court decides plaintiffs' motion for leave to amend. As noted above, the Court has never in fact decided that motion for leave to amend. Goldman Sachs also respectfully submits that the Court was inaccurate in further stating in its Memorandum and Order that "Plaintiffs' unchallenged claims under § 10(b) and § 20(a) of the Securities and Exchange Act of 1934 and the Texas Securities Act . . . remain pending." Memorandum and Order at 39. For the reasons stated above, there has been no occasion heretofore to contest these latter allegations; Goldman Sachs intends to move to dismiss the amended complaint if and when it becomes the operative complaint.

14. In light of the foregoing, Goldman Sachs respectfully requests that the Court clarify its Memorandum and Order insofar as it concerns the status of plaintiffs' proposed

amended complaint in Silvercreek I. Going forward, if the Court grants plaintiffs' motion for leave to amend the complaint, or the Court otherwise deems the proposed amended complaint the operative complaint, then Goldman Sachs asks the Court to clarify that Goldman Sachs' time to respond to (including filing a motion to dismiss) the amended complaint is governed by Paragraphs I.B. and I.D. of the Court's scheduling order dated July 11, 2003.

Goldman Sachs' Request for Reconsideration

15. The defendants showed in their briefs on the motion to dismiss the complaint in Silvercreek I that plaintiffs' existing, operative complaint—together with other documents cognizable on a motion to dismiss—actually negated the element of plaintiffs' reliance, which is a requisite for plaintiffs' claim under § 11 of the 1933 Act, especially in light of plaintiffs' sophistication and trading strategy and the inherent implausibility that they relied on 3-4 year old Enron financials. Evidently recognizing the insufficiency of the complaint's allegations, plaintiffs sought to bolster their claim of reliance by submitting the Morwick Declaration, and by adding further allegations in their proposed amended complaint, seeking to explain away their sophistication, trading strategy, and the other indicia of non-reliance cited by defendants.

16. In its Memorandum and Order, the Court, in sustaining the sufficiency of plaintiffs' allegations of reliance, cited and appeared to rely upon the Morwick Declaration and the allegations of the proposed amended complaint. See Memorandum and Order at 8-10, n. 7, 15-16, 25-26, and 30-33. As noted above, however, the Morwick Declaration had been stricken by the Court, and the proposed amended complaint is not the operative complaint. Accordingly, Goldman Sachs requests that the Court reconsider its decision with respect to the Section 11 claim. Specifically, Goldman Sachs requests that the Court set aside such portions of the Memorandum and Order denying Goldman Sachs' motion to dismiss the plaintiffs' claim under

§ 11 of the 1933 Act as quote or rely upon the Morwick Declaration or the allegations in the proposed amended complaint and reconsider its denial of the motion to dismiss that claim based on the actual record before the Court and the initial complaint. If, given the likelihood that the proposed amended complaint will become the operative complaint, the Court is not inclined at this time to dismiss the § 11 claim, then we ask the Court to defer ruling on that claim until Goldman Sachs has had an occasion and opportunity to file a brief on a motion to dismiss the amended complaint in its entirety.

17. A proposed order granting the requested relief is attached.

WHEREFORE, premises considered, Goldman Sachs respectfully prays that the Court grant its motion for clarification and reconsideration of the Court's December 10, 2003 Memorandum and Order.

Dated: December 24, 2003

Respectfully submitted,

CLEARY, GOTTLIEB, STEEN & HAMILTON

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CERTIFICATE OF CONFERENCE

On Monday and Tuesday, December 22nd and December 23rd, I had a number of communications (by voice mail, e-mail, and by letter) with Steven Williams, counsel for the plaintiffs, inquiring whether he opposes the foregoing motion; I had no direct phone conversation in that period with Mr. Williams, as he never returned any of my several calls. In an e-mail, Mr. Williams stated that he saw no urgency to the motion. I responded that motions for reconsideration -- or to bring to a Court's attention a possible error in an opinion -- must always be made promptly. Indeed, some districts require that such motions be filed within 10 days. See e.g. Local Civ. Rule 6.3, S.D.N.Y. and E.D.N.Y; see also, Fed. R. App. Pr. 40 (14 days). As of the close of business on Tuesday, December 23, 2003, Mr. Williams had still not given me his definitive position on the motion, nor had he provided a date by which he would advise me of his position. Accordingly, I must assume he opposes the motion.

Max Gitter by permission

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served upon all known counsel of record by website, http://www.esl3624.com, pursuant to the Court's order dated August 7, 2002 (Docket No. 984), on this the 24th day of December, 2003.

Max Gitter by permission

Max Gitter